2011 IL App (1st) 111367-U

No. 1-11-1367

FIFTH DIVISION
December 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TEN FOLD PARTNERS, LLC, an Illinois limited liability company, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 07 L 007285
CARLOS MUNOZ, Defendant-Appellee.	)	Honorable Ronald F. Bartkowicz, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice Joseph Gordon concurred in the judgment.

ORDER

¶ 1 ***HELD:*** *Trial court properly denied the motion to dismiss complaint alleging breach of real estate sales contract; complaint alleging failure to disclose code violations is sufficient to state a cause of action in absence of allegations of notice to seller where contract did not require notice.*

¶ 2 Defendant Carlos Munoz appeals from a judgment granting plaintiff Ten Fold Partners, LLC, damages in a breach of a real

estate contract action entered by the circuit court of Cook County. On appeal, the defendant argues the trial court erred in denying his section 2-615 and 2-619 motion to dismiss prior to judgment.

¶ 3 For the reasons set forth below, we affirm.

¶ 4 BACKGROUND

¶ 5 Original plaintiff Joseph Yonek filed a complaint on July 12, 2007, in the circuit court, alleging breach of a real estate sales contract by defendants Carlos Munoz and Kevin R. Johnson.

¶ 6 In the complaint, Yonek alleges that he entered into a real estate sales contract on October 14, 2005, to purchase from defendants the property located at 5422-26 W. North Ave., and 1603-11 N. Lotus Ave., in Chicago.

¶ 7 Yonek alleges that the defendants failed to disclose to him four citations issued by the City of Chicago to the defendants on September 9, 2005, for building code violations on the property. Yonek alleges the failure to disclose the citations is in violation of Provision H of the contract and Section 2(h) of a rider to the contract.

¶ 8 Provision H states:

> "Seller warrants that no notice from any city, village, or other governmental

> authority of a dwelling code violation that currently exists on the Property has been issued and received by Seller or Seller's agent ("Code Violation Notice"). If a Code Violation Notice is received after the Acceptance Date and before closing, Seller shall promptly notify Buyer of the Notice."

¶ 9 Section 2(h) of the rider states:

> "As of the date of the Contract, the Property is, and as of the date of the Closing will be, in compliance of all laws, ordinances and regulations affecting the Property, including, without limitation, all building, zoning, and public safety codes and ordinances applicable to the Property."

¶ 10 Yonek alleges he first became aware of the citations when the city issued additional citations in March 2006. Yonek alleges he was again cited for building code violations on April 3, 2006.

¶ 11 Yonek alleges he made no improvements or modifications to the property which would have resulted in the citations and that all the deficiencies cited in the citations existed at the time of closing.

¶ 12 Yonek alleges damages in the amount of $39,635, the amount of money he spent to correct deficiencies cited by the City of Chicago. Specifically, these damages include:

(1) $2,800 for permit drawings for porch repairs,

(2) $30,000 for repairs to the porch structure,

(3) $725 in fines issued by the city,

(4) $2,585 for repairs to the electrical lighting systems,

(5) $1,800 for repairs to the walkway,

(6) $900 for masonry work,

(7) $475 for electrical repairs, and

(8) $1,700 for lead abatement.

¶ 13 Yonek subsequently assigned his interest in the property to Ten Fold Partners, LLC (Ten Fold).

¶ 14 Defendants filed a section 2-615 and section 2-619 motion to dismiss (735 ILCS 5/2-615, 5/2-619 (West 2006)) on January 4, 2008, claiming: (1) Yonek failed to allege in his complaint that defendants received the citations from the city, (2) no specific violation of the contract is alleged, (3) Yonek failed to allege specifically which citation violations are at issue and which provision of the contract these citations breach, (4) several of the citations were dismissed, (5) damages alleged in the complaint are speculative, (6) Yonek waived his claim by failing to disaffirm the contract when he learned about the

citations, and (7) the contract should be dismissed under *laches* because defendants were prejudiced by Yonek's delay in acting on his breach of contract claim.

¶ 15 Defendants motion to dismiss was denied on April 17, 2008. Defendant Johnson filed a Chapter 7 Bankruptcy Petition on May 29, 2008, in federal bankruptcy court and filed a suggestion of bankruptcy in this case on June 15, 2009. The bankruptcy court's automatic stay prevented the plaintiff from taking any further action to collect against Johnson.

¶ 16 Defendant Munoz filed a motion for summary judgment, pursuant to section 5/2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2008)) on May 7, 2010, claiming Ten Fold failed to present evidence that he received notice of the citations prior to the closing of the sale. The motion was denied.

¶ 17 In a bench trial, the trial court issued a judgment on November 10, 2010, in favor of Ten Fold and against defendant Carlos Munoz for $29,800 plus costs. Munoz's motion to reconsider was denied on April 13, 2011.

¶ 18 Munoz filed this timely appeal on May 12, 2011.

¶ 19 ANALYSIS

¶ 20 Munoz does not challenge the trial court's judgment, rather, he claims the trial court erred in denying his section 2-

615 and section 2-619 motion to dismiss prior to issuing its judgment.

¶ 21 A motion to dismiss brought pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)) attacks the legal sufficiency of a complaint. *American National Bank* v. *City of Chicago*, 192 Ill. 2d 274, 279 (2000). In ruling on a section 2-615 motion, a court must accept as true all well-plead facts in the complaint and all reasonable inferences that may be drawn from the complaint. *American National Bank*, 192 Ill. 2d at 279. On review of a section 2-615 dismissal, we must determine whether the allegations of the complaint, when interpreted in a light most favorable to the plaintiff, sufficiently sets forth a cause of action on which relief may be granted. *Brock v. Anderson Road Association*, 287 Ill. App. 3d 16, 20 (1997). We review a section 2-615 motion to dismiss *de novo*. *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 586 (2004).

¶ 22 Munoz claims Ten Fold failed to allege in its complaint that a building code violation citation was issued to him or that he received such citation, citing *Sweetwood v. Mahoney*, 93 Ill. App. 3d 788, 791 (1981).

¶ 23 Provision H of the contract states in part: "Seller warrants that no notice from any city, village, or other governmental authority of a dwelling code violation that

currently exists on the Property has been issued *and* received by Seller." (Emphasis added).

¶ 24 A review of the complaint shows Ten Fold alleged that the city issued four citations to Munoz for building code violations on the property prior to closing. However, the complaint fails to allege the citations were "received by Seller," as is required by Provision H of the contract. The record does not contain any evidence that the citations were received by Munoz.

¶ 25 Ten Fold claims Munoz had constructive notice of the citations. In its appellate brief, Ten Fold claims "*** the Building Inspection Detail issued by the City of Chicago shows citations issued prior to closing and constitutes constructive notice to Munoz of the citations. Constructive notice is defined as 'notice arising by presumption of law from the existence of acts and circumstances that a party had a duty to take notice of; notice presumed by law to have been acquired by a person and thus imputed to that person.'" *LaSalle National Bank v. Dubin Residential Communities Corp.*, 337 Ill. App. 3d 345, 352 (2003).

¶ 26 In *LaSalle National Bank*, plaintiff filed a complaint alleging defendant's condominium building violated various City of Chicago zoning ordinances. *Id.* at 346-48. Defendant filed a section 2-619 motion to dismiss, claiming *laches* applied because

three years had passed between the construction of the condominium building and plaintiff's complaint. *Id.* at 349. The record showed plaintiff learned of the zoning violations shortly before filing his lawsuit. However, the trial court found that *laches* applied and granted defendant's motion to dismiss. *Id.* at 350.

¶ 27 On appeal, the plaintiff claimed the trial court erred in finding his lawsuit was barred by *laches* because he had no notice of the zoning violations and acted promptly upon discovering the violations. *Id.* We agreed and held that in order for *laches* to apply, defendant has the burden of showing plaintiff had prior notice of the facts giving rise to the claims. *Id.* Our analysis concerned whether the plaintiff had constructive notice of the zoning violations at the time of construction of the condominium building. We found the plaintiff did not have constructive notice of the zoning violations because there were no triggering factors to raise suspicion and/or investigation by the mere fact that the buildings were being built, especially where a valid building permit was posted on the construction sites. *Id.* at 355.

¶ 28 In identifying triggering factors of constructive notice, we found instruction from cases involving parties challenging the title to real property. In *Pyle v. Ferrell*, 12

Ill. 2d 547 (1958), plaintiff owned property but did not visit the land, pay taxes or attempt to learn of its status from 1932 through 1954. *LaSalle National Bank*, 337 Ill. App. 3d at 352-53 (citing *Pyle*, 12 Ill. 2d at 550). In 1954, the plaintiff became aware the property had been previously sold for delinquent taxes and he filed suit to quiet title. *Id.* The evidence showed the defendant bought the property for delinquent taxes in 1936, received a tax deed in 1938, paid taxes for 20 consecutive years, caused a joint interest in the estate to be conveyed to his wife in 1951 and executed an oil-and-gas lease covering the land in 1953. The court found that these were all matters of public record and served as constructive notice to plaintiff, thus, *laches* barred his claim. *Id.* at 353.

¶ 29 In *Slatin's Properties, Inc. v. Hassler*, 53 Ill. 2d 325 (1972), our supreme court found *laches* barred plaintiff's claim to quiet title because plaintiff failed to pay real estate taxes on the property for 40 years, while defendant paid the taxes during that time. *LaSalle National Bank*, 337 Ill. App. 3d at 53 (citing *Slatin's Properties*, 53 Ill. 2d at 331).

¶ 30 Here, unlike *Pyle* and *Slatin's Properties*, we are trying to determine whether defendant, not the plaintiff, had constructive notice of building code violations, as is required by the real estate contract. Based on the facts, we cannot say

defendant had constructive notice because, unlike *Pyle* and *Slatin's Properties* where matters of public record occurred for 20 to 40 consecutive years, the citations for building code violations here were issued while the parties were finalizing their transaction.

¶ 31 As previously stated, Provision H of the contract warrants that the seller has not received notice of building code violations. Ten Fold did not alleged in its complaint that Munoz received notice. Moreover, we cannot reasonably infer that Munoz received constructive notice because the triggering factors from *Pyle* and *Slatin's Properties* are missing in this case.

¶ 32 However, the alleged breach of the rider to the real estate contract is another matter. In the rider, Munoz warrants that the properties are in compliance with all building codes. Unlike Provision H of the contract, the rider does not contain a notice requirement.

¶ 33 Munoz claims his motion to dismiss should have been granted because Ten Fold's complaint is ambiguous and fails to specifically address "the causation of what was wrong with the property at the time of closing."

¶ 34 Section 2(h) of the rider does not require any such specificity, merely, that the property is in compliance with all building codes. Ten Fold has alleged in its complaint that the

properties are not in compliance with City of Chicago building codes, as is required under section 2(h) of the rider.

¶ 35 Furthermore, even if such specificity was required, Exhibit "C" to the complaint contains a copy of the city's citations and details of the building code violations.

¶ 36 Therefore, in respect to the section 2-615 aspect of Munoz's motion to dismiss, when interpreted in a light most favorable to the plaintiff, Ten Fold's complaint sufficiently sets forth a cause of action on which relief may be granted for breach of section 2(h) of the rider of the parties' real estate contract.

¶ 37 Next, Munoz claims the trial court erred in denying the section 2-619 portion of his motion to dismiss when it found Ten Fold's complaint is not barred by *laches*.

¶ 38 A section 2-619 motion to dismiss challenges a complaint based on certain defects or defenses. 735 ILCS 5/2-619 (West 2010). Section 2-619(a)(9) permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). The phrase "affirmative matter" refers to something in the nature of a defense that negates the cause of action completely. *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999). In reviewing a 2-

619 motion to dismiss, we accept as true all well-pled facts and reasonable inferences that may be drawn from those facts. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). Our review of a section 2-619 motion to dismiss is *de novo*. *Peregrine Financial Group, Inc. v. Futronix Trading, Ltd.*, 401 Ill. App. 3d 659, 660 (2010).

¶ 39 *Laches* is an equitable doctrine that precludes a litigant from asserting a claim when the litigant's unreasonable delay in raising the claim has prejudiced the opposing party. *Madigan v. Yballe*, 397 Ill. App. 3d 481, 493 (2009). In order to prevail on the affirmative defense of *laches*, a defendant must prove: (1) that there was a lack of due diligence by the plaintiff in bringing suit; and (2) plaintiff's delay resulted in prejudice to the defendant. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 822 (2008).

¶ 40 For the first requirement, plaintiff must have failed to seek prompt redress after having knowledge of the facts upon which their claim is based. *Id.* Plaintiff need not have actual knowledge of the specific facts upon which his claim is based if he fails to ascertain the truth through readily available channels and the circumstances are such that a reasonable person would make inquiry concerning these facts. *Id.* A mere lapse in time from the accrual of a cause of action to the filing of a

lawsuit is insufficient to support a *laches* defense. *Madigan*, 397 Ill. App. 3d at 493.

¶ 41 Munoz claims *laches* is applicable here because the facts meet the "*Slatin's Properties* test." In *Slatin's Properties*, our supreme court considered four factors in determining the applicability of *laches*: (1) conduct on the part of the defendant giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had notice or knowledge of defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit, and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is held not to be barred. *Slatin's Properties Inc.*, 53 Ill. 2d at 330 (citing *Pyle*, 12 Ill 2d at 553).

¶ 42 We previously reviewed *Slatin's Properties* and *Pyle* in our discussion on constructive notice. As we stated earlier, these cases concern plaintiffs who sat on their rights for 20 and 40 years. Here, unlike *Slatin's Properties* and *Pyle*, Ten Fold filed its complaint just 16 months after receiving its first citation from the city for building code violations. Unlike *Slatin's Properties* and *Pyle*, we cannot say Ten Fold sat on its

rights.

¶ 43 Munoz, however, claims that Ten Fold was in the best position to demand immediately that Munoz take action to remedy the building code violations in existence at the time of closing. We disagree. The record shows that Ten Fold mitigated its damages by immediately working with the city and hiring outside contractors to bring the structures on the property up to code and avoid further fines from the city.

¶ 44 Munoz cites *Miller v. Siwicki*, 8 Ill. 2d 362 (1956), in support of its claim that *laches* applies here. A review of *Siwicki* shows that it is much like *Slatin's Properties* and *Pyle* in that it is a case concerning a 23-year delay in asserting rights to a title in real estate. *Siwicki*, 8 Ill. 2d at 364. In finding that the lawsuit was barred by *laches*, our supreme court explained the reasoning behind the doctrine of *laches* in the following manner:

> "'By reason of the lapse of time the memories of men have failed; death has intervened; records and accounts that, when inspected by those who made them, could have been understood and readily explained from the current history contained in them, have by flight of time and the death of those

> acquainted with the details, from the barrenness of their statements, and the imperfect manner in which they were kept, become of doubtful value and uncertain indices of the transactions they were intended to preserve.'" *Id.* at 366 (citing *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261, 263 (1903)).

¶ 45 Here, we cannot say the 16 months between the time Ten Fold learned of the building code violations and its filing of its complaint had the "memories of men failed," unlike *Siwicki* where there was a period of 23 years before an assertion of a right to title in real property. *Id.* Therefore, the trial court in the instant case did not err what it found that *laches* did not apply as a bar to Ten Fold's complaint.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 48 Affirmed.